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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 320

UNITED GAS PIPE LINE COMPANY, *Petitioner*

v.

TYLER GAS SERVICE COMPANY and CITY OF TYLER, TEXAS, *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 520

UNITED GAS PIPE LINE COMPANY, *Petitioner*

v.

TYLER GAS SERVICE COMPANY and CITY OF TYLER, TEXAS, *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

COUNTER STATEMENT OF QUESTIONS PRESENTED

Does a judgment of one United States Court of Appeals affirming an order of a United States District Court dismissing for failure to state grounds for equitable relief a complaint for injunction alleging that a rate filing by a natural gas company violates contracts, the ground of the dismissal being that the Federal Power Commission is empowered to give adequate relief, bar another United States Court of Appeals from

finding, on review of an order of the Federal Power Commission, that the natural gas company's rate filing does violate contracts?

COUNTER STATEMENT OF THE CASE

The Dealings Between Respondents and United

From November 22, 1940 until May 10, 1946 United[1] sold gas to Tyler Gas under a contract and amendments thereto duly filed with the Commission under Section 4(c) of the Natural Gas Act. That contract fixed a flat rate of 22.5¢ per MCF for gas resold for domestic use and a rate for gas resold for industrial use of 80% of the proceeds received by Tyler Gas from such sales, but not less than 16¢ per MCF.

On May 10, 1946 the contract was amended to reduce the rate for domestic gas to 12¢ per MCF and the rate for industrial gas to 80% of the proceeds received by Tyler Gas from sales of industrial gas, but not less than 7.2¢ per MCF. As so amended the contract makes no provisions for changes in rates during its term, which runs to July 25, 1962. This amendment was duly filed with the Commission under Section 4(c) of the Natural Gas Act. The circumstances surrounding this amendment are well summed up in the Memorandum Opinion and Findings of Fact and Conclusions of Law rendered on December 29, 1953, by the United States District Court for the Eastern District of Texas in *Tyler Gas Service Company and*

[1] Throughout this Brief Petitioner may be called United, Respondents Tyler Gas and City, the Federal Power Commission the Commission, the Court of Appeals for the District of Columbia Circuit the D. C. Circuit, the Court of Appeals for the Fifth Circuit the Fifth Circuit and the District Court for the Eastern District of Texas the District Court.

City of Tyler v. *United Gas Pipe Line Company*, Civil No. 1662, as follows (Record 123-125):

"In 1946, the franchise which had been granted to Tyler Gas by City expired. At that time, natural gas was in abundant supply in the vicinity of the City of Tyler by reason of the proximity of a number of producing fields. As the expiration of Tyler's Gas franchise neared, a group of citizens approached the City Commission with the proposal that the franchise of Tyler Gas be not renewed; that a new distributing company be organized, which would procure its gas from new sources at a price less than Tyler Gas paid United; and that greatly reduced rates thus might be made available to the consumers. The City Commission was quite receptive to this suggestion and for a period of several months had it under serious consideration. Tyler Gas, of course, desired to have its franchise renewed, and United was anxious to retain this market for its product. After considerable haggling over price, and being fully conversant with these facts, United consented to reduce its price to Tyler Gas of gas for domestic consumption from 22½¢ to 12¢ MCF if City would renew the Tyler Gas franchise. A proposed new franchise for Tyler Gas was prepared, specifying the rates it would charge its consumers. These proposed rates were predicated on a rate of 12¢ from United to Tyler Gas for domestic gas and 80% of the amount received by Tyler Gas, though in no event less than 7.2¢ for industrial gas. The franchise provided further that under certain contingencies the City might take over and acquire the property and distributing system of Tyler Gas. In an abundance of caution and before approving such franchise, bottomed as it was on the proposed reduction in rates from United to Tyler Gas, the City Council requested of United that United commit itself in writing to such proposal. Pursuant

thereto, on April 3, 1946, United addressed a letter to City wherein United agreed to the proposed rates to be charged Tyler Gas; agreed that such rates would be the maximum rates which United would charge Tyler Gas for a period of sixteen years (subject only to increase in the event of imposition of certain taxes, not material here); and agreed that in the event City exercised its right to acquire the properties of Tyler Gas, then United would thereafter sell to City on the same basis and pursuant to the same contractual provisions. In reliance thereon, the proponents of the new and competing company withdrew the application for franchise, the City renewed the franchise of Tyler Gas for a period approximating the life of the contract, and the original contract of 1940 between United and Tyler Gas was amended, whereby the new rates were fixed at the agreed figures."

United Files Its Conversion Tariff in Compliance With the Commission's Order

On October 30, 1948 the Commission issued Order No. 144 in Docket No. R-107. This order, now Section 154.81 et seq. of the Commission's Regulations under the Natural Gas Act, required natural gas companies to convert their percentage rates to specific dollars and cents rates and to restate them as such by a date certain. After unsuccessfully contesting the validity of this order before the Commission and in the D. C. Circuit United finally, on July 3, 1952, filed a so-called conversion tariff in compliance with it. This tariff contained rate schedules proposed to be made applicable to sales to Tyler Gas for domestic use "where Buyer has executed with Seller a Service Agreement," (Record 21) and to sales to Tyler Gas for industrial use by McMurrey Refining Company

"where Buyer has executed with Seller a Service Agreement for service under this Rate Schedule." (Record 22) The tariff also contained the so-called Standard Service Agreements to which the above quoted portion of the rate schedules made reference.

The Effect of the Conversion Tariff on Tyler Gas

United's conversion tariff for Tyler Gas fixed a flat rate of 7.5¢ per MCF for gas for industrial use by McMurrey Refining Company in lieu of the contract percentage rate with its 7.2¢ per MCF minimum. For domestic gas the conversion tariff fixed a flat rate of 11.2¢ per MCF, .8¢ per MCF below the contract rate. At the same time the conversion tariff made the domestic rate applicable to all industrial gas other than that for McMurrey Refining Company. Under the contract all industrial gas was purchased at the industrial percentage rate. The net effect of the substitution of the conversion rates for the contract rates was to increase slightly the total cost of gas to Tyler Gas.[2]

Upon the filing of the conversion tariff Tyler Gas wrote a letter to the Commission objecting to it. (Record 307-310) The Commission took no notice of this letter, but, on August 1, 1952, issued an order allowing the conversion tariff to become effective on August 3,

[2] There is no evidence in the Record upon which the D. C. Circuit and the Commission acted respecting the effect of the conversion tariff on the cost of gas to Tyler Gas. Discussing this, the D. C. Circuit said (App. to Pet. for Cert. 6): "There is some disagreement between the parties as to the amount of the higher cost under the conversion tariff. Tyler Gas tells us it was a difference of $2,600.88, or 1%, while respondent claims the difference was $7,900.00, or 3%. The data to determine which figure, if either, is correct is not before us, even if we were interested in computing the difference."

1952. Tyler Gas never executed the Standard Service Agreements referred to in the conversion rate schedules proposed to be made applicable to it. However, although those rate schedules made the execution of the Standard Service Agreements a condition precedent to their applicability, domestic and industrial gas was nevertheless in fact sold by United and bought by Tyler Gas at the rates set forth in those schedules from August 3, 1952, until after United's rate filings in Docket G-2210 on June 24, 1953.

The Proceedings in Commission Docket G-2210

On June 24, 1953, in Docket No. G-2210, United filed with the Commission under Section 4(d) of the Natural Gas Act proposed increases in both its domestic and industrial rates to Tyler Gas. Respondents intervened in Docket No. G-2210, challenging the filing on the grounds that it violated their contracts with United, that the increased rates were unjust and unreasonable, and that United's sales to Tyler Gas were in intra-state commerce and therefore beyond the jurisdiction of the Commission. (Record 72-73)

The proposed increases in industrial rates were made effective July 25, 1953. The proposed increases in domestic rates were suspended by the Commission pursuant to Section 4(e) of the Natural Gas Act for the maximum statutory period of five months. (Record 67-71) They became effective December 25, 1953, under an order lifting suspension issued January 25, 1954. That order required United to refund with interest at 6% any portion of the increases subsequently found unjustified.

Hearings in Docket G-2210 were commenced but never concluded. Rather, conferences among United,

the Commission's Staff and various intervenors were held. These resulted in a partial settlement of the issues in Docket No. G-2210, which settlement was agreed to by all of the parties except Tyler Gas, Tyler City and Mississippi River Fuel Corporation and approved by the Commission in Opinion and Order No. 277, issued November 2, 1954. (Record 77-102) Throughout the settlement conferences Respondents stood on their challenges to United's right to abrogate the contract rate and to the justness and reasonableness of United's filing in Docket No. G-2210. They therefore accepted the rates fixed by the settlement only conditionally, subject to the subsequent determination of the issues raised in their interventions.

The Commission took cognizance of the position of Respondents in its Opinion and Order No. 277. Paragraph (C) thereof provided that the settlement rates be collected from Tyler Gas under bond subject to refund until further orders of the Commission. (Record 97-98) Paragraph (O) provided that the proceedings in Docket G-2210 remain open for the purpose of "determining the matters involved and issues presented by the petitions to intervene of Tyler Gas and Tyler." (Record 101)

Respondents Vainly Seek Judicial Relief

In the meantime, on December 8, 1953, after it had become evident that the issues raised by Respondents in Docket G-2210 would not be determined by the Commission before the period of suspension expired on December 25, 1953, and United made its domestic rate increases effective, Respondents invoked the diversity jurisdiction of the United States District Court for the Eastern District of Texas in a suit

for (1) a preliminary injunction to restrain United from making the suspended rates effective, and (2) a judgment declaring the contracts between Petitioners and United valid, subsisting and enforceable and enjoining United from violating them. United filed motions to dismiss Respondents' complaint in the District Court on the grounds that the court lacked jurisdiction and that the complaint failed to state a claim upon which relief could be granted.

A hearing on the request for a preliminary injunction was held by the District Court on December 14, 1953. On December 23, 1953 the District Court issued a memorandum opinion not only denying the preliminary injunction, which was the subject of the hearing, but also granting United's motion to dismiss the complaint for the reason that United had urged, i.e., that the Commission had exclusive authority to determine the issues raised in the complaint and was "amply empowered to give [Respondents] adequate relief." (Record 131). On December 30, 1953, the District Court entered its order dismissing the cause in all things "for failure of the Bill of Complaint to state or show grounds for equitable relief." (Record 133-134) The United States Court of Appeals for the Fifth Circuit affirmed this order on the grounds " . . . that the commission is empowered under and in accord with the terms of the Act to afford relief and that any relief due the plaintiff must be sought from the commission and under and in accordance with the Act." *Tyler Gas Service Company and City of Tyler, Texas* v. *United Gas Pipe Line Company*, 217 F. 2d 73, 77.

Respondents File Their Motion for Refund With the Commission

No further action was taken by Respondents, United or the Commission respecting the issues raised by Respondents in Docket No. G-2210 until after the decisions of this Court on February 27, 1956 in *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U. S. 332, and *Federal Power Commission* v. *Sierra Pacific Power Company*, 350 U. S. 348, 76 S. Ct. 368. Thereafter, on May 15, 1956, Tyler Gas filed with the Commission a Motion for Refund of the amounts United had been collecting under bond subject to refund pursuant to the order of the Commission of January 25, 1954 and the further order in Paragraph (C) of Opinion and Order No. 277. (Record 97-98)

The Proceedings in Commission Docket Nos. G-9547 and G-10592

On September 30, 1955, in Docket G-9547, and on May 15, 1956, in Docket G-10592 United filed further general increases in its rates, including increases in its rates for gas purchased by Tyler Gas for re-sale for both domestic and industrial use. In each docket Tyler Gas and City filed a joint petition with the Commission for an order rejecting the filing on the ground that it was in violation of valid and subsisting contracts between Tyler Gas and United and between City and United and therefore illegal.

The Commission's Opinion and Order No. 294

The Commission heard oral argument on the Motion in Docket No. G-2210 and the Petitions in Docket Nos. G-9547 and G-10592 together on July 13, 1956. (Rec-

ord 494-570) On October 2, 1956 it issued Opinion and Order No. 294. The Order denied the Motion and both Petitions. (Record 571-580) Briefly, the Opinion stated that United's so-called conversion tariff, filed on July 3, 1952 in compliance with the Commission's Order No. 144, which required the restatement of rates in dollars and cents per unit, became effective to govern the rates for sales of gas to Tyler Gas on August 3, 1952, and that since the latter date there has been no contract rate in effect governing sales by United to Tyler Gas. The Opinion further stated that the decision of the United States Court of Appeals for the Fifth Circuit, 217 F. 2d 73, affirming the decision of the United States District Court dismissing Respondents' suit for injunction for want of a right to relief in a court of equity, barred the granting of the Motion for Refund in Docket No. G-2210.

The Opinion and Judgment of the D. C. Circuit

Respondents, having sought and been denied rehearing of Opinion and Order 294, filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. United intervened, filed briefs and argued orally to the Court. On August 1, 1957 the Court rendered its opinion and judgment. It held that this case was not distinguishable from the *Mobile* Case, that Respondents were entitled to the relief they sought from the Commission, and that the judgment of the Fifth Circuit did not bar the Commission from granting Respondents that relief.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Reasons Advanced by Petitioner

Review on writ of certiorari by this Court is "not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor." (Rule 19(1)) The "special and important reasons" Petitioner advances for the granting of certiorari here are that the D. C. Circuit, "without being empowered thereto, exercised a revisory power over the Fifth Circuit decision, appellate in character," and, in addition, refused to adhere to the principle of *res judicata*. (Pet. for Cert. 10, 11)

The infirmity in these contentions is that the D. C. Circuit *did not* "revise" the judgment of the Fifth Circuit and *did not* refuse to adhere to the principle of *res judicata*. On the contrary, it proceeded upon the assumption that the defense of *res judicata* could properly be pleaded by United and properly be considered by the Commission. Its holding was that the principle of *res judicata* was not correctly applied by the Commission to bar the relief Respondents sought. In short, it simply held that the judgment of the Fifth Circuit was not an adjudication that Respondents were not entitled to the relief they sought, but rather an adjudication that they could not get the relief they sought except by recourse to the Commission.

Thus, even if we assume that the D. C. Circuit erred, the error is in the application of the principle of *res judicata* in the facts of a particular case. Such error, unlike error in the definition or delimitation of the principle itself, is not a sufficient reason for the exercise by this Court of its discretion to review on writ

of certiorari. Compare *In Re Woods*, 143 U. S. 202 with *Angel* v. *Bullington*, 330 U. S. 183.

The Decision of the D. C. Circuit That the Rule of the Mobile Case Is Applicable Is Correct

It is not altogether clear from the Petition for a Writ of Certiorari whether Petitioner challenges the holding of the D. C. Circuit that the rule of the *Mobile* Case forbids United from making unilateral changes in its contract with Tyler Gas and that the Commission erroneously permitted it to do so in this case. However, in any event, as the D. C. Circuit held, this case is on all fours with the *Mobile* Case. As United itself argued to this Court in its Petition for Certiorari in that case, p. 15, fn. 15, Tyler Gas is in "precisely the same situation" as Mobile.

Here as in *Mobile* United sells gas under a long-term contract that fixed rates and that made no provision for rate changes during its term. Here as in *Mobile* United, during the term of the contract, filed a so-called conversion tariff in compliance with the Commission's Order No. 144. Indeed the conversion filings were made at the same time in the same proceeding—Docket No. G-2019. Here as in *Mobile* the conversion tariff changed the contract rates. Here as in *Mobile* the conversion tariff was accompanied by a statement identifying the terms of the contract that were not changed, which statement did not identify the rate terms as unchanged. Here as in *Mobile* gas was bought and paid for at the conversion rates from the date the Commission permitted them to take effect—the same date in both cases. Here as in *Mobile* United thereafter filed increased rates under Section 4(e) of the Natural Gas Act. Here as in *Mobile* Respondents

challenged the legality of the increased rate filings on the ground that they violated the contract. The D. C. Circuit therefore correctly held that there was "no sound basis in fact or principle to distinguish this case from *Mobile*." (App. to Pet. for Cert. 8)

The Judgment of the Fifth Circuit Is Not Res Judicata

The judgments in the Fifth Circuit upon which United relies to support its plea of *res judicata* did not go to the merits of Respondents' claims. Both the District Court and the Court of Appeals held only that Respondents had administrative remedies available, had failed to exhaust them, and that the doctrine of primary administrative jurisdiction precluded resort to the Courts except by way of review of administrative action. This is perfectly clear from both the findings of fact and conclusions of law and judgment of the District Court, and from the opinion of the Court of Appeals affirming the judgment. The District Court "Ordered, Adjudged and Decreed: The application of Plaintiffs for temporary injunction is denied and this cause is herewith in all things dismissed for failure of the Bill of Complaint to state or show grounds for equitable relief." (Record 133-134) It is to be noted that *the Court dismissed the bill of complaint. It did not render judgment for the defendant.*

This disposition of the case is highly significant in view of the pleadings. United's Answer to the Complaint of Respondents was accompanied, as permitted by Rule 12(b) of the Federal Rules of Civil Procedure, by a motion to dismiss for lack of jurisdiction and a motion to dismiss for failure to state a claim upon which relief could be granted. The basis of both

motions was that Respondents were in the wrong forum, i. e., that their case belonged in the Federal Power Commission and not in the District Court. Both motions, to clinch their argument, conceded that in the Commission Respondents had a right to have their claims adjudicated on the merits. Thus, in its motion to dismiss for lack of jurisdiction United said:

> "the granting of an injunction would be for this Honorable Court to substitute its judgment . . . for the exclusive discretion of the administrative agency to whose sole authority and jurisdiction the Natural Gas Act commits all such matters, *including the propriety of the very matters sought to be enjoined here.* (Emphasis supplied) (Record 274)
>
> "said complaint shows on its face that all of the subject matter of this suit is now properly and validly pending before the Federal Power Commission in Docket G-2210; . . . that [plaintiffs] are parties to said cause, and that all of the matters, facts and issues sought to be submitted here have already been submitted by the Plaintiffs to the Federal Power Commission *which is competent at the law to hear and determine the matters posed by the Plaintiffs and to determine whether they constitute the basis of any right to relief*, and that said hearing is in course and is not completed." (Emphasis supplied) (Record 281)

In its motion to dismiss for failure to state a claim upon which relief could be granted United said:

> "(1) Said complaint shows upon its face that Plaintiffs have intervened in and are now active parties to Docket G-2210, . . . and that said Plaintiffs are thus empowered to adduce any evidence in their possession on the question of the right and justification to the Defendant to the increase

sought, *including the force and effect, if any, of the contentions made herein based upon the contract between Defendant and Tyler Gas Service Company.*" (Emphasis supplied) (Record 282)

Having thus challenged by motions to dismiss the authority of the District Court to entertain the Complaint, United then proceeded to answer the Complaint on the merits. The Answer admitted some facts and denied others. Specifically, it denied that it was not abiding by the terms of any existing contract with Tyler Gas, denied that it had any contract with City, and denied that "the matters relied on in the bill of complaint as constituting part of" said contract were a contract "which the parties were able legally and validly to make." (Record 300)

Thus United joined two broad issues. It challenged the right of the Court to entertain the cause on its merits by motion to dismiss. It challenged the existence and validity of the contracts with Respondents by answer, its challenge of the validity being on the same ground as its unsuccessful challenge of the contract held valid by the Supreme Court in the *Mobile* Case, *supra*. How did the District Court dispose of the case with the issues thus joined? It disposed of the case on the first issue by granting United's motion to dismiss the complaint for failure to state a claim upon which relief could be granted.

It did not determine the second issue, much less dispose of the case on that issue. This is perfectly clear, for had it done so it would have rendered judgment either for the plaintiff or for the defendant. Under the Federal Rules of Civil Procedure if the court sustains defenses required to be raised by answer

it grants judgment for the defendant. It does not dismiss the complaint. Rule 12, Rule 56. United's defense denying the existence and validity of the contracts which were the basis of Respondents' Complaint was of course one that could not be raised by a motion to dismiss. Rule 12(b) of the Federal Rules of Civil Procedure.

In short the District Court dismissed the Complaint, not because it was without merit as alleged in United's Answer, but because, as alleged in United's motion to dismiss, it failed to state a cause of action cognizable in a court of equity. The Court's Memorandum, which it adopted as its findings of fact and conclusions of law, makes it plain that, in the Court's view, the reason the Complaint failed to state a cause of action cognizable in a court of equity was that:

> "Any relief to which plaintiffs may be entitled in the premises must be secured through action of the Commission and not of this Court. The Commission is amply empowered to give adequate relief." (Record 130)

The Court of Appeals affirmed the District Court's dismissal of the complaint on the ground that Petitioner "is empowered under and in accordance with the terms of the [Natural Gas] Act to afford relief and that any relief due the plaintiff must be sought" from the Commission. 217 F. 2d 73, 74. It did not hold that contract rates could be abrogated by a unilateral filing under Section 4 of the Act. This is obvious from the fact that the Court discussed the *Mobile* Case in its opinion, accurately stated the holding of the Court of Appeals for the Third Circuit in said case and concluded that:

> "Assuming, without deciding, that the opinion of the majority is right, that of Judge Hastie, the dissenting member, is wrong, we think it plain that the opinion does not conflict with, that indeed it supports and confirms, the view of the district judge: that 'Any relief to which plaintiff may be entitled in the premises must be secured through action of the commission and not of this Court: The commission is amply empowered to give adequate relief'; and that the plaintiffs did not show grounds for equitable relief." (217 F. 2d at p. 78)

Undoubtedly, from the foregoing statement, the Fifth Circuit makes it clear that its opinion and the opinion and judgment of the District Court were not in conflict with the Third Circuit in the *Mobile* Case. Certainly, if the opinion of the Fifth Circuit had been based upon the conclusion that the contract between United and Tyler Gas had been abrogated by the filing of United's conversion tariff it would have been incumbent upon it either to assert affirmatively that it did not agree with the Third Circuit in the *Mobile* Case or to reverse the judgment of the District Court. Having done neither, it is obvious that the Fifth Circuit merely concluded, as the opinion recites, that "Any relief to which plaintiff may be entitled in the premises must be secured through action of the Commission and not of this Court," and nothing more.

In the face of all of this the only rational interpretation of the opinion and judgment of the Fifth Circuit is that it decided only that Respondents were in the wrong forum. Any other interpretation requires the absurd conclusion that the United States Court of Appeals for the Fifth Circuit in the *Tyler* Case held precisely contrary to the United States Court of

Appeals for the Third Circuit in the *Mobile* Case and at the same time relied upon that case to support its holding.

The fact that both the District Court and the Fifth Circuit discussed in their opinions the question of United's right to file rate increases with the Commission is immaterial. Contrary to United's argument, it is highly doubtful that Respondents could have successfully sought a writ of certiorari from this Court for the purpose of securing an adjudication of that question. In the *Mobile* Case this Court, in alluding to the decision of the Fifth Circuit in the *Tyler* Case, noted that the basis for the decision there was strictly procedural. This Court, 350 U. S. at page 346, said: "The Court of Appeals for the Fifth Circuit, *although distinguishing its decision on a procedural ground*, has indicated a contrary conclusion." (Emphasis supplied) Indications of conclusions will not support judicial review. *Black v. Cutter Laboratories*, 351 U. S. 292. In that case the Supreme Court dismissed a writ of certiorari to the Supreme Court of California on the ground that the decision involved no substantial federal question. The petitioner had argued that the opinion of the Supreme Court of California contained statements establishing rules of law violative of the Constitution of the United States. The answer of this Court was that it "reviews judgments, not statements in opinion." 351 U. S. at p. 297. *A fortiori* statements in opinions or indications of conclusions will not support a plea of *res judicata*.

United makes much of the fact that the District Court found that it had jurisdiction of the subject

matter and the parties. This is true but beside the point. The Court had jurisdiction of the subject matter because there was diversity of citizenship. It had jurisdiction of the parties because there was legal service of the complaint upon United. It therefore had power to decide whether the complaint stated a cause of action which it could adjudicate. Finding that it did not, the Court properly ordered dismissal, not for lack of jurisdiction, but, in the parlance of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief could be granted. *Montana-Dakota Util. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U. S. 246, 249.

So too, United's reliance on the fact that the Fifth Circuit denied its motion to dismiss Respondents' appeal as moot is misplaced. United emphasizes that the Court denied that motion on the ground that the District Court had not only denied a preliminary injunction but had entered a final order "determining the case on the merits." (Record 361; Pet. for Cert. 12, 13) But the question is the merits of what. The answer is the merits of Respondents' claim that the District Court had authority to grant them relief.

Angel v. *Bullington*, 330 U. S. 183, is apt here. That was a suit following foreclosure of a mortgage for a deficiency judgment in a United States District Court in North Carolina, the jurisdiction of the Court being laid on diversity of citizenship. Prior to that suit the Supreme Court of North Carolina had dismissed a suit on the same cause of action on the ground that a statute of North Carolina barred all suits by mortgagees for deficiency judgments. This Court held that the judgment of the Supreme Court of North Carolina barred the subsequent suit in a United States District

Court in North Carolina. It reasoned that a United States District Court exercising diversity jurisdiction was a court of North Carolina; that the Supreme Court of North Carolina had held that all of the courts of the State were closed to the suit; and that that holding, having been made in the face of a claim that the State lacked power under the United States Constitution so to close its courts, could not be re-litigated. In answer to the argument that the Supreme Court of North Carolina had not adjudicated the merits of the controversy the Supreme Court said that the issue was whether all of the courts of North Carolina were closed and that the merits of that issue had been adjudicated.

Applying the rule of the *Angel* Case here, the issue adjudicated in the Fifth Circuit was the right of Respondents to judicial relief without prior resort to the Federal Power Commission. The Court denied that right. Its judgment to that effect concededly bars a subsequent suit on the same cause of action without prior resort to the Commission. But that is all it bars. It obviously cannot bar proceedings in the Commission on the issue of the legality of United's rate filing, since the whole thrust of the judgment was that the Commission had authority to determine that issue in the first instance while the Court did not.

The situation here is exactly the one distinguished by this Court in the *Angel* Case at 350 U. S. p. 190, i.e.,

where a decision is based "on the ground that the distribution of judicial power among the various courts of the State requires the suit to be brought in another court." In that situation a judgment declining to exercise jurisdiction is not a bar to a suit in a court that has jurisdiction. Here the Court of Appeals for the Fifth Circuit held that the Congressional distribution of power among the various tribunals of the United States required Respondents to prosecute their claims initially in the Federal Power Commission rather than in a federal court. Obviously a judgment that the Court has no authority to determine the merits of a claim but that only an administrative agency has such authority cannot bar the determination of the merits by the administrative agency.

In sum United's position comes to this. Having blown hot in the Fifth Circuit it blew cold before the Commission. Having once eaten its cake it tried to have it again. This the D. C. Circuit properly held it could not be permitted to do. It could not be permitted to defeat Respondents in court on the ground that they had a remedy in the Commission and then defeat them in the Commission on the ground that they lost in court. To use the Court's own words, "[w]e cannot see how a decision that a party must seek relief before an administrative agency can be *res judicata* of the merits of the agency's later denial of the relief requested." (App. to Pet. for Cert. 9)

It is submitted that the petition for a writ of certiorari should be denied.

Respectfully,

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